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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 778.

JOHN A. POTUCEK, Trustee of WILSON SUGAR AND ELEVATOR COMPANY, INC., Bankrupt,
Petitioner,

vs.

CORDELERIA LOURDES and CORDELERIA SANTA INES,
Respondents.

In the Matter of DONALD L. WILSON and MARGIE I. WILSON and WILSON SUGAR AND ELEVATOR COMPANY, INC., Bankrupt.

ON PETITION FOR CERTIORARI

BRIEF OF RESPONDENTS.

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OPINION BELOW.

The opinion of the Court of Appeals is reported in 310 F.2d 527.

References are to the record printed for the court below.

STATEMENT OF THE CASE.

The order of the referee was entered September 12, 1960. (R. 52) Counsel for respondents first learned of the entry of the order on September 22, 1960. (R. 52-53) On the same day, upon application of counsel for respondents, the court entered an order extending the time for filing petition for review to October 12, 1960. (R. 53-54) On October 12, 1960, upon application of counsel for respondents, the court further extended the time for filing petition for review to December 12, 1960. (R. 53-54)

The verified application for the further extension stated as ground therefor that the court reporter had been unable to complete the transcript of the proceedings and testimony before the referee. (R. 53) The second extension was granted by the referee, who had personal knowledge of the facts stated in the application. (R. 54)

Petitions for review were filed October 26, 1960, long prior to expiration of the second extension. (R. 54-60)

A local rule required that a petition for review contain appropriate references to the transcript. (Appendix A)

ARGUMENT.

I.

Construction of 11 U.S.C., Section 67(c), Is Not Doubtful.

11 U.S.C. 67(c) provides:

"(c) A person aggrieved by an order of a referee may, within ten days after the entry thereof or with-

> in such extended time as the court *upon petition filed within such ten-day period* may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. *Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final.*"

The italicized portions of the statute were added by amendment effective July 14, 1960. 74 Stat. 528.

The purpose of the statute was to change the rule of *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, under which discretionary review was permitted even though nothing whatsoever had been filed within ten days after entry of the referee's order.

As passed by the House only the first sentence was amended in the italicized particulars. At the request of the Judicial Conference of the United States, the bill was amended in the Senate by adding the third sentence. U. S. Code, Congressional and Administrative News, 86th Congress, Second Session, Vol. 2, p. 3197.

The amendment to the second sentence had no effect whatsoever upon the doctrine of the *Pfister* case. Only the third sentence effectuated the purpose. Nothing in that sentence would prevent review in the case at bar. The petition was clearly filed "within such ten-day period or *any* extension thereof."

Petitioner's contention is founded upon the first sentence alone. The Court of Appeals followed the *Pfister* case in holding that nothing in that sentence forbade discretionary review.

The purpose of the rule was to prevent discretionary review where neither a petition for review nor an application for an extension had been filed within the ten day period.[1] This purpose is served equally well by one or multiple extensions provided application for extension is made within ten days, and provided application for a second extension is made prior to expiration of a prior extension. It is not even necessary that the application for an extension be acted upon within the ten day period.[2]

General Order 37 makes the Rules of Civil Procedure applicable "in so far as they are not inconsistent with the Act or with these general orders * * *."

Rule 6(b) authorizes the court with or without notice to enlarge time "if request therefor is made before the expiration of the period originally prescribed *or as extended by a previous order* * * *." (Emphasis supplied)

Unless inconsistent with the statute this rule governs and under it the petitions for review were clearly timely. Is it inconsistent with the statute?

The only cases we have found hold that the statute means the same thing as the rule.

In *MacFarland* v. *Byrnes*, 19 App. D.C. 531, 535, the court said:

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1. "There is now uncertainty as to the finality of a referee's order under this doctrine that a bankruptcy court may entertain an untimely petition for review even in the absence of an extension of time. The purpose of the bill is to fix a definite period of time within which an application for review must be filed." Report of Senate Judiciary Committee, U. S. Code, Congressional and Administrative News, 86th Congress, Second Session, Vol. 2, p. 3197.

2. Cf. *Candal De Lopez* v. *Sociedad Espanola De Auxilio, etc.*, 1 Cir., 45 F.2d 331.

"With reference to the motion to dismiss the appeal in this case on the ground that the transcript of record was not filed here in time, we find no merit in the proposition that the jurisdiction of the court below to grant an extension of time was exhausted by the first extension granted. We have decided that, after the lapse of the time prescribed by our rules for filing the transcript of record here, or after the lapse of any extension of such time granted during the first period, the court below is without authority to grant any further extension. *District of Columbia* v. *Roth*, 18 App. D.C. 547. *But we find no good reason for refusing that authority to the court, as long as the cause remains within its jurisdiction; and the cause remains within its jurisdiction for this purpose during the whole period of the extension.* Rule 15 of the rules of this court, which confers the authority under which the court below has assumed to act, provides that 'it shall be the duty of the appellant, within forty days from the time of the appeal entered and perfected in the court below, unless such time for special and sufficient cause be extended by the court below, or the judge thereof by whom the judgment, decree or order may have been rendered, such time to be definite and fixed, to produce and file with the clerk of this court a transcript of the record of such cause.' It is argued that this means only one extension, because otherwise the court below might grant extensions from time to time indefinitely, and the time of extension would therefore not be 'definite and fixed.' *But that this is not the meaning of the rule seems to us to be very plain, when it is remembered that under the authority to grant one extension, if only one is granted, the court could allow as long delay as by many extensions. The rule is intended for the purpose of justice. It confers a discretionary power to grant an extension for good and sufficient cause; and it is not to be presumed that the discretion will be abused. The 'good and sufficient cause' may well continue beyond the first period of extension.* We may assume that there was no reason

> for urgency in this case, and that there may have been a tacit understanding between the parties not to push it until a decision should be had from the Supreme Court in the case of *Davidson* v. *Wight*. But whatever the good and sufficient cause may have been we are of opinion that it was not the purpose of the rule, and that it is not its requirement, to limit the court below to one extension of time; provided of course, that any second extension is made, as in this case, within the lifetime of the first extension; and provided, also, that the length of the extension and the number of extensions are not unreasonable." (Emphasis supplied) (pp. 535-537)

Tallmadge v. *Hooper*, 37 Or. 503, 61 Pac. 349, a statute required the filing of the record on appeal within thirty days after perfection of the appeal, but authorized the court or judge to enlarge the time but "such order shall be *made* within the time allowed to file the transcript." The appeal was perfected on January 22. On February 15 the court extended the time for filing the transcript to April 1. On March 31 the court further extended the time to April 15 and the transcript was filed prior to that date. In denying appellee's motion to dismiss the court said:

> "In support of the second contention, it is argued that while the trial court or judge thereof, or the supreme court or a justice thereof, is authorized to enlarge the time for filing a transcript on appeal, such order can be made only within the 30 days allowed to file the transcript. But this does not impress us as the better view. * * * The 'time allowed to file the transcript,' within the meaning of the law, is the 30 days provided by the statute, or such an extension thereof as may have been granted." (p. 351)

Title 11, section 67 (c) in the second sentence requires that the petition for review "set forth the order complained of and the alleged errors in respect thereto." This require-

ment is made more specific by local rule VII, of which this court takes judicial notice.[3] The local rule requires that the petition for review make "appropriate references to the transcript." (Appendix) Subsection (a)(8) of the same section 67 of Title 11 requires the referee to transmit "a transcript of the evidence or a summary thereof" to the judge upon the filing of a petition for review.

The second extension was granted prior to expiration of the first because the reporter had not completed the transcript of the evidence. (R. 53, 54) In most instances it would be impossible to prepare a petition complying with the requirement that the petition set forth the alleged errors without the transcript. In all instances it would be impossible to prepare a petition complying with the local rule without the transcript. In all instances it would be impossible for the referee to certify the record in compliance with section 67 (a)(8) without the transcript.

To construe the statute in such a way as to preclude review if the petitioner or the court granting the extension should underestimate the time required for preparation of a transcript would be at odds with the purpose of the statute and unreasonable.

"All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and the legislative purpose." *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394.

"Every statute must be interpreted in the light of reason and common understanding to reach the results

3. *Johnson* v. *2500 Wisconsin Avenue*, D.C. Cir., 231 F.2d 761.

intended by the legislature." *Rathbun* v. *United States*, 355 U.S. 107, 109.

Giving the statute a reasonable interpretation, the jurisdictional requirement for review is the filing of the petition for review or a petition for extension within the ten day period. Within the meaning of the statute, if a petition for an extension be filed and an order entered thereon within the ten day period a second extension entered prior to expiration of the first is an extension upon petition filed within the ten day period.

The use of the words "any extension" in the third sentence of section 67(c) is itself a recognition that multiple extensions may be required. "Any" ordinarily is a comprehensive word meaning each and every.[4]

The case at bar is the first case interpreting the amended statute in regard to multiple extensions upon application filed within the ten day period. We think it highly improbable that the Court of Appeals for any other circuit will arrive at a different conclusion. If that should occur, it will be time enough then for review by this court.

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4. *United States* v. *Rosenwasser*, 323 U.S. 360, 362-363; *Kuhlman* v. *W. & A. Fletcher Co.*, 3 Cir., 20 F.2d 465, 468; *Boyd* v. *Bell*, 68 Ariz. 166, 203 P.2d 618, 626; *Northwest Casualty Co.* v. *Legg*, 91 Cal. App. 2d 19, 204 P.2d 106, 109 ("one or more"); *Iowa-Illinois Gas & Electric Co.* v. *City of Bettendorf*, 241 Iowa 349, 41 N.W.2d 1; *Lambert* v. *New England Fire Ins. Co.*, 148 Me. 60, 90 A.2d 451, 455; *State* v. *Hawk*, 360 Mo. 490, 228 S.W.2d 785, 788; *Pursley* v. *Inman*, 215 S.C. 243, 54 S.E.2d 800; *Doherty* v. *King*, (Tex. Civ. App.) 183 S.W.2d 1004, 1007; *State* v. *Brotherhood of Friends*, 41 Wash.2d 133, 247 P.2d 787, 794.

II.

Court Followed Clearly Erroneous Rule Laid Down by This Court.

The opinion clearly shows that the court below followed the "clearly erroneous" rule laid down by this court. No further discussion seems warranted.

CONCLUSION.

We respectfully submit that the petition for certiorari does not present a case falling within Rule 19 and that it should be denied.

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APPENDIX A.

Rule VII in Bankruptcy of the United States District Court for the District of Kansas, Adopted December 1, 1949.

A petition for review shall be filed with the Clerk of the Court, together with proof of service of a copy thereof upon the adverse parties who were represented at the hearing. The petition shall set forth the order complained of and the alleged errors in respect thereto. It shall contain a summary and short statement of the matters involved, with proper references to documents in the files, and, where a question of fact is involved, a concise statement of the evidence relating thereto, with appropriate references to the transcript. A supporting brief may be annexed to the petition, but it shall be direct and concise. The adverse party shall have ten days from the date of the service of the petition for review to file an answer thereto, which answer must be concise, and a supporting brief may be annexed thereto. The clerk shall forthwith transmit the petition for review and the answer thereto to the Judge. No certificate of the Referee shall be necessary, except on the order of the Judge. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the Referee or by a Judge upon such terms as will protect the rights of all parties in interest.